

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER WITH REGARD TO PLAINTIFFS' NOTICE OF
DEPOSITION DIRECTED TO DONNA ERWIN AND REQUEST FOR
PRODUCTION OF DOCUMENTS DIRECTED TO INTERIOR DEFENDANTS

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Defendants respectfully move this Court for a protective order preventing Plaintiffs from taking the deposition of Ms. Donna Erwin and from pursuing the document production directed to Interior Defendants in a Notice of Deposition and Request for Production of Documents dated October 30, 2003 ("Plaintiffs' Discovery Requests"), a copy of which is attached hereto as Exhibit 1.¹ Defendants

¹ Plaintiffs' Discovery Requests were served upon Defendants' counsel on or about October 30, 2003, without any prior communication to government counsel. By serving these discovery requests without attempting to confer with Defendants' counsel, Plaintiffs have ignored the Court's admonition that counsel should confer regarding the scheduling of depositions. See Order of May 8, 1998; Transcript of November 6, 1998 Hearing at 2 ("I don't know what's happened to the notion that I was trying to set forth in May about civility, but I don't think that the plaintiff should have noticed those depositions without a discussion about dates with the defendants first") (attached as Exhibit 2). Moreover, Plaintiffs have similarly disregarded the Court's admonition and, without prior communication with government counsel, have issued deposition notices for Secretary Norton, Associate Deputy Secretary James Cason, Michael Carr, Anson Baker, Deborah Gibbs Tschudy, Lonnie Kimball, Donna Erwin, David Bernhardt, Bert Edwards, Elouise Chicharello, and Lucy Querques-Denett.

are entitled to protection because Plaintiffs lack any authority to depose Ms. Erwin or to conduct document inspections at this time. Further, even if some discovery were permitted now, Plaintiffs cannot demonstrate that the discovery described in Plaintiffs' Discovery Requests is permitted under the principles of review for cases where jurisdiction is based upon the Administrative Procedure Act.² Finally, the discovery described in Plaintiffs' Discovery Requests is beyond the scope of permissible discovery under Rule 26(b) of the Federal Rules of Civil Procedure. Accordingly, pursuant to Rule 26(c), Defendants move for a protective order.³

ARGUMENT

I. PLAINTIFFS SHOULD NOT BE PERMITTED TO DEPOSE MS. ERWIN OR TO REQUEST DOCUMENTS FOR PRODUCTION BY INTERIOR DEFENDANTS BECAUSE NO DISCOVERY IS CURRENTLY AUTHORIZED IN THIS CASE

At this stage of the litigation, Plaintiffs are neither authorized by the Court nor in need of the ability to conduct discovery. Discovery for the Phase 1.5 trial was completed in April 2003; the Phase 1.5 trial concluded in July 2003; and this Court issued its Phase 1.5 rulings, which included its structural injunction, on September 25, 2003.

The Court's discovery order for the Phase 1.5 trial provided for the conduct of fact discovery beginning October 7, 2002, and concluding March 24, 2003, and for the conduct of

² Defendants note and reassert their continuing objection to discovery on the ground that such discovery is improper in an APA case. For that purpose, we incorporate by reference the arguments set forth in Defendants' Motion For a Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior, pages 5-7 (filed Nov. 10, 2003).

³ Pursuant to Rule 26(c) and Local Civil Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs on November 5, 2003 in an attempt to resolve this and other discovery disputes, without the need for judicial intervention. Plaintiffs' counsel stated that they would oppose this motion.

expert depositions from March 7, 2003, until April 10, 2003. Phase 1.5 Trial Discovery Schedule Order (filed Oct. 17, 2002). This discovery order did not authorize Plaintiffs to conduct any discovery after April 10, 2003, and, Plaintiffs have not sought leave of Court to conduct any of their roving discovery out of time. Of course, if Plaintiffs were to file such a request, it plainly would lack merit because the Court has already issued its September 25, 2003 rulings following the conclusion of the Phase 1.5 trial.

Moreover, the Court's structural injunction and other September 25, 2003 rulings do not authorize further discovery by Plaintiffs. In particular, the Court's structural injunction describes a series of deadlines, which extend through September 30, 2007, for the Department of Interior to perform specific tasks. The Court's September 25, 2003 rulings ultimately may result in a "Phase 2" trial, and if that ultimately is scheduled, it is possible that discovery will be authorized for that proceeding. At the present time, however, there is no discovery order in place for a Phase 2 trial, nor should there be such an order, inasmuch as the trial would be years in the future under the structural injunction's timetable.

Finally, there are no other proceedings before the Court requiring discovery. Even if Plaintiffs' Discovery Requests were purportedly related to some future proceeding in this case,⁴ the parties have not held a discovery planning conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure 26(f). Thus, Plaintiffs are not authorized to conduct any discovery at this time. Fed. R. Civ. P. 26(d), 30(a)(2)(C), and 34(b).

⁴ During the meet-and-confer conference on November 5, 2003, referenced in footnote 3, above, Plaintiffs' counsel declined to articulate any specific reasons for any of the discovery sought in Plaintiffs' Discovery Requests..

II. PLAINTIFFS' DISCOVERY REQUESTS ARE BEYOND THE SCOPE OF PERMISSIBLE DISCOVERY

The Federal Rules of Civil Procedure establish scope limitations on discovery. In particular, parties may only obtain discovery regarding matters that are “relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b)(1). Moreover, although information need not be admissible at trial to be discoverable, the information sought must be relevant, and the discovery requests must be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

During the course of the meet-and-confer conference initiated by Defendants' counsel on November 5, 2003, see note 3, above, Plaintiffs' counsel repeatedly refused to identify any of the subject areas they would cover in the course of their wide-ranging discovery plans, including the deposition noticed for Ms. Erwin. Plaintiffs' refusal to describe the information sought from Ms. Erwin makes it impossible for the Court and Defendants to assess claims of relevance. Moreover, to the extent one might speculate that the proposed discovery is related to the documents described in Plaintiffs' Discovery Requests, it is apparent that such discovery has no bearing upon the Court's structural injunction and, therefore, it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.⁵

Finally, as the Court is aware, the Defendants filed a Notice of Appeal with regard to the September 25, 2003 structural injunction, and the Court of Appeals issued an administrative stay of that injunction on November 12, 2003. Plaintiffs, therefore, have no basis for seeking to inquire about what Defendants are presently doing to comply with the structural injunction. As such, a protective order is warranted to prevent the deposition. Fed. R. Civ. P. 26(c) (protective

⁵ Indeed, insofar as no trial or other hearings are currently scheduled, the context for assessing admissibility is not even apparent.

order appropriate “to protect a party or person from annoyance, . . . oppression, or undue burden or expense.”).

Conclusion

For the foregoing reasons, we respectfully request that the Court issue a protective order, pursuant to Rule 26(c), preventing Plaintiffs from taking the deposition of Ms. Donna Erwin and from pursuing the document production directed to Interior Defendants, as described in Plaintiffs' Discovery Requests.

Respectfully submitted,

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November 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that, on November 19, 2003 the foregoing *Defendants' Motion for a Protective Order with Regard to Plaintiffs' Notice of Deposition Directed to Donna Erwin and Request for Production of Documents Directed to Interior Defendants* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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